SUPREME COURT, U.S.
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No. 93-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE QUESTIONS PRESENTED BY THE PETITIONERS ARE ON DIRECT REVIEW IN THIS COURT 1

A. The Issue Of Whether The Contempt Fines, Penalties, And Award Of Attorneys' Fees Are Civil Or Criminal In Nature Are Matters Of Direct Review 4

II. THE LAW OF THE CASE IS THIS COURT'S DECISION VACATING THE SECOND CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S IMPOSITION OF CRIMINAL-TYPE SANCTIONS AND HOLDING APPLICABLE THE KU KLUX KLAN ACT TO PETITIONERS WITH ITS SECTION 1988 AWARD OF ATTORNEYS' FEES 7

A. Under This Court's Decision In Harper v. Virginia Dept. Of Taxation, The Bray Decision Must Be Given Full Retroactive Effect 9

CONCLUSION 10

TABLE OF CONTENTS cont'd

APPENDIX

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit Of Reverend Robert Pearson, Et Al., No. 92-282, Dated August 11, 1992

TABLE OF AUTHORITIES

Page(s)

CASES

Bray v. Alexandria Women's Health Clinic, 506 U.S. ____, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) 2, 7, 9, 10

Cabot Corp. v. United States, 12 C.I.T. 664, 10 I.T.R.D. 1736, 694 F. Supp. 949 (Ct. Int'l Trade 1988) 5

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988) 6

Federal Deposit Ins. Corp. v. Ramirez-Rivera, 869 F. 2d 624 (1st Cir.), *reh'g denied*, (1989) 8

Gertz v. Welch, 680 F. 2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983) 8

Harper v. Virginia Department of Taxation, ____ U.S. ____, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) 9

TABLE OF AUTHORITIES cont'd

Page(s)

In re PCH Associates,
949 F.2d 585 (2d Cir. 1991) 5

In re Sanford Fork & Tool Co.,
160 U.S. 247, 16 S. Ct. 291,
40 L. Ed. 414 (1895) 8

International Union, United Mine Workers of America v. Bagwell,
____ U.S. ____,
113 S. Ct. 2439, 124 L.
Ed. 2d 657 (1993) 3, 4, 10

New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339
(2d Cir. 1989),
cert. denied, 495 U.S. 947
(1990) 1, 4, 6, 7, 9

New York State Nat'l Org. for Women v. Terry, 961 F. 2d 390
(2d Cir. 1992) 2, 6, 7, 9

New York State Nat'l Org. for Women v. Terry, 996 F.2d 1351 (2d Cir. 1993) 3

NLRB v. United Technologies Corp.,
706 F.2d 1254 (2d Cir. 1983) 5

TABLE OF AUTHORITIES cont'd

Page(s)

Pearson v. Planned Parenthood Margaret Sanger Clinic, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) 2-4, 6, 7, 9, 10

Southern Ry. Co. v. Clift, 260 U.S. 316, 43 S. Ct. 126, 67 L. Ed. 283 (1922) 5

United States v. Bulculfine, 527 F.2d 941 (1st Cir. 1975) 8

United States v. Rivera-Martinez, 931 F. 2d 148 (1st Cir.), *cert. denied*, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991) 8

United States v. United States Smelting, Refining and Mining Co., 339 U.S. 186, 70 S. Ct. 537, 94 L. Ed. 750, *reh'g denied*, 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379 (1950) 5, 6

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 98 S. Ct. 702, 54 L. Ed. 2d 659 (1978) 8

TABLE OF AUTHORITIES cont'd

Page(s)

RULES AND STATUTES

28 U.S.C. § 1254(1) 6

42 U.S.C. § 1985(3) 2

42 U.S.C. § 1988 . . . . . 1-3, 6, 7, 10

Rule 10(c) of the Supreme
Court of the United States (1990) 4

OTHER AUTHORITIES

1B J. Moore, J. Lucas & T. Currier,
Moore's Federal Practice,
¶ 0.404 [1] (1993) 8

18 C. Wright and A. Miller,
Federal Practice and Procedure
§§ 4416, 4419, 4420 and 4478 (1993) 5, 6

IN THE

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PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

Petitioners Reverend Robert Pearson, et al., herein reply to the arguments raised in the Respondents Brief in Opposition.

ARGUMENT

I. THE QUESTIONS PRESENTED BY THE PETITIONERS ARE ON DIRECT REVIEW IN THIS COURT

In an effort to create confusion, the Respondents inartfully raise the doctrine of res judicata in an attempt to dissuade this Court from considering the questions presented in the instant petition for certiorari.

Petitioners seek relief from various final judgments of the district court (all of which were adjudicated post-*Terry* I[1]) assessing *inter alia* (1) 42 U.S.C. § 1988 attorneys' fees on the

[1] *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

main case of $157,505.81;[2] (2) $83,009.69 contempt attorneys' fees[3] and contempt fines totalling $375,000.[4] These district court judgments were affirmed in *Terry II*, 961 F. 2d 390 (2d Cir. 1992) (See, Pet. for Cert. App. D: A-8 to A-37). All of these judgments are properly on direct review in this court in the instant petition for certiorari.

Under Docket No. 92-282 in this Court, filed on August 11, 1992 Petitioners filed the *Pearson I* petition for writ of certiorari to the Second Circuit. (The *Pearson I* petition is reproduced in the Appendix to this Reply Brief). The issues raised in that petition (and throughout all prior proceedings) involved the applicability of 42 U.S.C. § 1985(3) (hereinafter referred to as the Ku Klux Klan Act) to abortion protesters, 42 U.S.C. § 1988 attorneys' fees (see, Questions Presented I, II, III) and whether the enormous fines levied against Petitioners were civil or criminal in nature (see, Question Presented No. V).

The legal issues regarding 42 U.S.C. sections 1985(3) and 1988 were identical to those presented in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. ____, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) which was decided on January 13, 1993. That decision held that the Ku Klux Klan Act did not apply to anti-abortion protestors and vacated the *Bray* respondents' section 1988 award of attorneys' fees. Accordingly, on February 22, 1993, this Court granted the *Pearson I* petition for certiorari and vacated the *Terry II* judgment of the Second Circuit, remanding

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[2] See, *New York State Nat'l Org. for Women v. Terry*, 961 F. 2d 390, 395 (2d Cir. 1992) (Pet. for Cert. Appendix D, at A-18) (hereinafter "*Terry II*"), *cert. granted and judgment vacated sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) (hereinafter "*Pearson I*").

[3] See, *Terry II*, 961 F. 2d at 395 (Pet. for Cert. App. at A-18).

[4] See, Petition for Cert. at 8 listing the specific contempt fines.

it to the Second Circuit for reconsideration, in the light of *Bray, sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic*, ____ U.S. ____, 113 S. Ct. 1233, 122 L. Ed. 2d 640 (1993) (see, Pet. for Cert. App. C: A-7).

Inexplicably, on July 2, 1993, the Second Circuit, ignoring the mandate of this Court, re-instated without modification the judgment which this Court had vacated, and suggested that the matter be sent back to the district court.[5] See, Per Curiam decision, *New York State Nat'l Org. for Women v. Terry*, 996 F.2d 1351 (2d Cir. 1993) (see, Pet. for Cert. App. B: A-3 to A-6).

No reasons were given for this apparent defiance of this Court's mandate.

Prior to the Second Circuit's failure to follow the mandate of this Court by re-instating the judgment which this Court had vacated on February 22, 1993, this Court granted certiorari in the case of *International Union, United Mine Workers of America v. Bagwell*, ____ U.S. ____, 113 S. Ct. 2439, 124 L. Ed. 2d 657 (1993) on June 1, 1993, (Docket No. 92-1625, hereinafter "*Bagwell*"). *Bagwell* raises issues regarding the nature of criminal and civil contempt which are identical to those raised by Petitioners herein (see, instant Pet. for Cert. at pp. 9-14). Lest there be any doubt as to whether these issues are identical, the *Bagwell* petition, at pages 17 and 18, cites what it describes as a "dangerous" line of cases involving anti-abortion protestors which have effectively ended the requirements for criminal due process in civil disobedience cases merely by characterizing punitive sanctions as "civil".

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[5] By reinstating the judgments, the Second Circuit made recourse to the district court futile as to those final judgments: $157,505.81 for § 1988 attorneys' fees on the main case; $83,009.69 in contempt attorneys' fees and $375,000 in contempt fines.

This, indeed, is a dangerous turn in our jurisprudence, reminiscent of the former Soviet Union where political dissidents were committed civilly to mental hospitals rather than afforded the modicum of due process guaranteed in the Soviet Constitution for criminal cases. Accordingly, the instant case and *Bagwell* raise issues which go far beyond the abortion controversy, namely the extent to which a free society will allow civil disobedience, in the tradition of the Abolitionists, of the Labor Movement, of Mohandas K. Gandhi, of Martin Luther King, Jr., and of the anti-Vietnam War protesters to be crushed without due process merely by characterizing the mechanism of suppression as "civil".

Accordingly, this Court should review this case pursuant to the standards set forth in its Rule 10(c) and either vacate and reverse the alleged civil contempt judgments, fines and penalties, and the awards of attorneys' fees, or vacate and remand for further proceedings consistent with the decision in *Bagwell* and this Court's prior order in this case in *Pearson I* (see, Pet. for Cert. App. C: A-7).

A. The Issue Of Whether The Contempt Fines, Penalties, And Award Of Attorneys' Fees Are Civil Or Criminal In Nature Are Matters Of Direct Review

Essentially, Respondents argue that all issues raised by Petitioners were previously decided in *Terry I*: these matters are therefore "res judicata", not subject to "collateral attack" or "direct review". "Important considerations of finality" preclude "reconsideration" "regardless of the merits". Respondents' Brief in Opposition, passim.

These technical words of art are nowhere defined by Respondents; they wrongfully assume to be true the very points they must prove.

However, specific definitions are necessary for the legal concepts known generically as res judicata (literally, a matter having been judged, from judicata, past passive participle of judicare, to judge) and known specifically as claim preclusion, collateral estoppel (or issue preclusion) and law of the case.

Res judicata contemplates a final judgment on the merits between the parties and is an absolute bar to further litigation. *Cabot Corp. v. United States*, 12 C.I.T. 664, 10 I.T.R.D. 1736, 694 F. Supp. 949, 954, n.2 (Ct. Int'l Trade 1988); cf. *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1259 (2d Cir. 1983). It is a matter of compulsion, not discretion (as are issue preclusion and law of the case). *Southern Ry. Co. v. Clift*, 260 U.S. 316, 43 S. Ct. 126, 67 L. Ed. 283 (1922). Res judicata and collateral estoppel contemplate the existence of a final judgment by the highest Court to have considered the case. *In re PCH Associates*, 949 F.2d 585, 593 (2d Cir. 1991). The issue must have been "both actually litigated and actually decided." 18 C. Wright and A. Miller, *Federal Practice and Procedure* § 4419 at 177; § 4420 at 182 (1993) (hereinafter "*Federal Practice And Procedure*").

By comparison, issue preclusion or collateral estoppel contemplates a separate lawsuit involving identical issues previously determined on the merits. 18 *Federal Practice and Procedure* § 4416 at 137-38.

A fortiori, if a matter in dispute is law of the case it cannot be res judicata or collateral estoppel. This is so because both claim and issue preclusion can arise only when a matter has been fully litigated. As long as it is *in fieri* as opposed to *judicata*, claim and issue preclusion can not arise. Cf. *United States v. United States Smelting, Refining and Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750, *reh'g denied*, 339 U.S. 972, 70 S. Ct. 994, 94 L. Ed. 1379 (1950).

Therefore, neither claim nor issue preclusion can be applicable in these proceedings since they are ongoing (*in fieri*), not finally decided (*judicata*). Cf. *United States et al. v. United States Smelting, Refining and Mining Corp.*, *supra* at page 198. That the decision in the Second Circuit which the Respondents erroneously describe as res judicata is actually law of the case is proven by the fact that the Second Circuit itself characterized its reasons for not reconsidering the district court's contempt and attorneys' fees judgments as its prior rulings on these issues in *Terry I*, which was law of the case. *Terry II*, 961 F.2d at 395-396 (1992) (see, Pet. for Cert. App. D: A-19 to A-20). Therefore, since it was only adhering to its previous decision in *Terry I*, the Second Circuit felt no need to change its ruling "at least at this juncture of the litigation". *Terry II*, 961 F.2d at 396 (see, Pet. for Cert. App. D: A-20).

By comparison, this Court has full power to review the Second Circuit by virtue of 28 U.S.C. § 1254(1) as indicated by *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). So long as a matter is properly preserved in a lower Court (in this case, the civil v. criminal nature of the sanctions, applicability of the Ku Klux Klan Act, and the Section 1988 award of attorneys' fees) the fact that the lower Court can properly refuse consideration of matters of law of the case (as the Second Circuit did in *Terry II*) of course does not prevent subsequent review and reversal on appeal. 18 *Federal Practice and Procedure* § 4478 at 801; c*f. Christianson*, 486 U.S. at 817 ("a petition for certiorari can expose the entire case to review").

And this of course is precisely what happened on February 22, 1993: the judgement of the Second Circuit which it had based on the law of the case was vacated in *Pearson I*. Therefore, Respondents' claim that res judicata precludes reconsideration by this Court is without merit.

II. THE LAW OF THE CASE IS THIS COURT'S DECISION VACATING THE SECOND CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S IMPOSITION OF CRIMINAL-TYPE SANCTIONS AND HOLDING APPLICABLE THE KU KLUX KLAN ACT TO PETITIONERS WITH ITS SECTION 1988 AWARD OF ATTORNEYS' FEES

In *Pearson I*, Petitioners requested this Court to grant certiorari to the Second Circuit. (The Petition is reproduced in the Appendix to the Reply Brief). They sought review of the Second Circuit's decision in *Terry II* reported at 961 F. 2d 390 (2d Cir. 1992). A previous petition for certiorari had been denied by this Court, not on the merits or because *Terry I* was somehow res judicata as respondents erroneously argue, but because the Second Circuit had not yet decided *Terry II*.[6] Following the Second Circuit's decision in *Terry II*, Petitioners again sought certiorari, which was granted after this Court's decision in *Bray*; the Second Circuit's judgment was vacated by this Court in *Pearson I*.

The Second Circuit had based its decision in *Terry II* on the doctrine of law of the case which required it to adhere to its prior decision in *Terry I*. *Terry II*, 961 F.2d at 396 (see, Pet. for Cert. App. D: A-20). However, the Second Circuit's judgment in *Terry II* was itself vacated and remanded by this Court.

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[6] That petition for certiorari was denied by this Court as premature. This Court's order stated: "No. 91-875 *Florence Talluto, et al., Petitioners v. Planned Parenthood Margaret Sanger Clinic (Manhattan) et al.*, January 21, 1992. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit *before judgment* is denied." ____ U.S. ____, 112 S. Ct. 957, 117 L. Ed. 2d. 124 (1992) (emphasis added).

As Professor Moore puts it:

> When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand. If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶ 0.404 [1], at II-3 (1993) (emphasis in original).

It follows that "when a case is decided by a appellate court and remanded --- any questions that were before the appellate court and disposed of by its decree become the law of the case and bind the district court on remand". *United States v. Bulculfine*, 527 F.2d 941, 943 (1st Cir. 1975); accord, *Federal Deposit Ins. Corp. v. Ramirez-Rivera*, 869 F. 2d 624 (1st Cir.), *reh'g denied*, (1989); cf. *United States v. Rivera-Martinez*, 931 F. 2d 148, 150 (1st Cir.), *cert. denied*, 112 S. Ct. 184, 116 L. Ed. 2d 145 (1991).

As this Court explained in *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-428, 98 S. Ct. 702, 703-704 (1978):

> '[w]hen a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate.'

(quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S. Ct. 291, 293, 40 L. Ed. 414 (1895)); cf. *Gertz v. Welch*, 680

F. 2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983).

Accordingly, the mandate of this Court in *Pearson I*, vacating the Second Circuit's judgment in *Terry II*, became the law of the case in all subsequent proceedings in inferior Courts, including the Second Circuit. Respondents' contention that *Terry I* controls the instant petition for certiorari is fallacious.

A. Under This Court's Decision In Harper v. Virginia Dept. Of Taxation, The Bray Decision Must Be Given Full Retroactive Effect

In *Bray v. Alexandria Women's Health Clinic*, *supra*, this Court held that the Ku Klux Klan Act did not cover anti-abortion protesters and vacated the award of section 1988 attorneys' fees based thereon. In turn, this Court in *Pearson I* vacated the judgment and remanded to the Second Circuit for reconsideration in light of *Bray*.

The most recent pronouncement of this Court on the subject of retroactivity is *Harper v. Virginia Department of Taxation*, ____ U.S. ____, 113 S. Ct. 2510, 125 L. Ed. 2d 74, 86 (1993).

The operative language of this Court is as follows:

> When this Court applies a rule, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open in direct review and as to all events, regardless of whether such events predate or postdate our announcement of this rule.

Accordingly, *Bray* must be given full retroactive effect and the award of Section 1988 attorneys' fees on the main case, based on the Second Circuit's erroneous conclusion that the Ku Klux Klan Act is applicable to anti-abortion protesters, must be vacated.

CONCLUSION

Certiorari should be granted to Petitioners and the decision of the Second Circuit re-instating the judgment previously vacated by this Court should either be vacated and reversed in light of this Court's rulings in *Bagwell* and *Pearson I* (based on *Bray*), or vacated and remanded for further consideration in light of the *Bagwell, Pearson I* and *Bray* decisions.

Dated: New Milford, CT.
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APPENDIX

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

II. Is opposition to abortion *per se* discrimination against women for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

III. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

IV. Are Respondents' claims under 42 U.S.C. section 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

V. Are the phenomenally large and unconditional contempt fines levied against the petitioners for participating in sit-in demonstrations (from $25,000 to $100,000, totalling $375,000) criminal in character, thus requiring application of criminal due process protections?

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Christopher Slattery, B.O.R.N. Randall A. Terry, and Thomas Herlihy, & Operation Rescue.

The Petitioners were defendants and non-party contempt respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin, Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against either the defendants or non-party Petitioners in the proceedings at issue in the courts below. The United States was a judgment

creditor (by virtue of the contempt fines) in the district court a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

DECISIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Course of Proceedings 4

B. Statement of Facts 5

REASONS FOR GRANTING THE WRIT 8

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985 8

A. Federal Jurisdiction 8

B. The Right to Interstate Travel 11

C. **Class Animus** 13

TABLE OF CONTENTS (cont'd)

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature 15

CONCLUSION 19

APPENDICES

Appendix A: Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, 961 F.2d 390 (2d Cir. 1992) A - 1

Appendix B: Temporary Restraining Order dated May 5, 1988 A - 28

Appendix C: Preliminary Injunction dated October 27, 1988 A - 32

Appendix D: Permanent Injunction dated January 10, 1989 A - 36

Appendix E: Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, 732 F.Supp. 400 (S.D.N.Y. 1990) A - 40

Appendix F: Order assessing contempt fines against Petitioners, May 10, 1990 A - 92

TABLE OF CONTENTS (cont'd)

Appendix G:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 95
Appendix H:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 108

TABLE OF AUTHORITIES

CASES:

Attorney General of New York v. Soto-Lopes, 476 U.S. 898 (1986) 12

Bray v. Alexandria Women's Health Clinic, *cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985) . . . . passim

Califano v. Gautier Torres, 435 U.S. 1 (1978) 12

Crozer-Chester Medical Center v. Moran, 560 A.2d 133 (Pa. 1989) 19

Douglas v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1971) 19

Doyle v. London Guarantee & Acc. Co., 204 U.S. 599, 51 L.Ed. 641, 644 . . . . . 16, 18

Dunn v. Blumstein, 405 U.S. 330 (1972) 12

Falstaff v. Miller, 702 F.2d 770 (9th Cir. 1983) 19

Gompers v. Buck's Stove & Range, 221 U.S. 418 (1911) 16

Griffin v. Breckenridge, 403 U.S. 88 (1971) 11

Hicks v. Feiock, 485 U.S. 624 (1988) 15, 16, 18

In Re Merchants' Stock & Grain, 223 U.S. 639, 32 S.Ct. 339, 546 L.Ed. 584 (1912) 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

In re Stewart, 571 F.2d 958 (5th Cir. 1978) 19

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 12

Michaelson v. United States, 266 U.S. 42 (1924) 18

National Abortion Federation v. Operation Rescue, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) 12, 14

New York State Nat. Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) 4

New York State Nat. Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) 4, 6, 16, 18

New York State Nat. Organization for Women v. Terry, 732 F. Supp. 400 (S.D.N.Y. 1990) . . passim

New York State Nat. Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992) . . . . . passim

Nye v. United States, 313 U.S. 33 (1941) 16, 18

Penfield v. Securities & Exchange Commission, 330 U.S. 585 (1947) 16, 18

Re Christian Engineering Co., 194 U.S. 458, 24 S.Ct. 729, 47 L.Ed. 1072 (1903) . . . 16, 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

Shapiro v. Thompson, 394 U.S. 618 (1969) 12

Shillitani v. United States, 384 U.S. 364 (1966) 18

Thornburgh v. American Coll. of Obst. & Gyn, 476 U.S. 747 (1986) 19

U.S. Catholic Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988) 9, 11

Union Tool v. Wilson, 259 U.S. 107 (1922) 16, 17

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825 (1983) 11

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989) 15

United States v. Miller, 540 F.2d 1213 (4th Cir. 1976) 19

United States v. North, 621 F.2d 1255 (3rd Cir. 1980) 19

United States v. Spectro Foods, 544 F.2d 1175 (3rd Cir. 1976) 19

United States v. United Mine Workers, 330 U.S. 258 (1947) 9-11

Young v. U.S. Ex Rel. Vuitton Et Fils S.A., 481 U.S. 787 (1987) 15

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1985(3) 2, 4, 8, 11, 14, 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. 92-282

Reverend Robert Pearson, et al.,

Petitioners

v.

Planned Parenthood Margaret Sanger Clinic (Manhattan), et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The two decisions of the district court resulting in two contempt judgments (Appendix F: A-92 to A-94 and Appendix H: A-108 to A-109) are reported in *New York State Nat. Organization for Women v. Terry*, 732 F. Supp. 400 (S.D.N.Y. 1990) (Appendix E: A-40 to A-91) and an unreported oral bench ruling which incorporates the first ruling (Appendix G: A-95 to A-107). The three underlying injunctive orders are included in the Appendix (A-28 to A-39). The appeals from these judgments were consolidated in the court of appeals. The

decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (A1-A27).

JURISDICTION

The judgments of the district court for the Southern District of New York were entered on May 10, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines in the United States Court of Appeals for the Second Circuit were decided on April 13, 1992. This Court has jurisdiction, under 28 U.S.C. section 1254(1) to review the judgment of the United States Court of Appeals. An order was issued by Associate Justice Clarence Thomas, Application No. A-10, on July 6, 1992, extending the time for filing this petition to and including August 11, 1992.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified

person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and coercive civil contempt fines totalling $375,000 for alleged violations of the three injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: a temporary restraining order dated May 5, 1988 (Appendix B: A-28 to A-31), a preliminary injunction dated October 27, 1988 (Appendix C: A-32 to A-35) and a permanent injunction dated January 10, 1989 (Appendix D: A-36 to A-39).

Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Respondents have asserted two federal causes of action: First, a conspiracy to violate a right to travel under 42 U.S.C. section 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under Section 1985(3). Respondents also asserted various pendant state causes of action including trespass. Intervenor Respondent City of New York asserted a public nuisance claim under state law and no federal claim. Federal jurisdiction in the district court was invoked under 28 U.S.C. sections 1331 and 1343.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-36 to A-39) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary

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2 *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990).

3 *New York State Nat. Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod., New York State Nat. Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women).

restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totalling $375,000 and attorney's fees. The appeal of these huge fines and attorneys' fees was argued before the court of appeals for the Second Circuit on May 20, 1991, and decided on April 13, 1992.

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $375,000 in contempt fines were assessed payable to the United States. *See*, Judgments at Appendices F, H (A-92 to A-94 and A-108 to A-109).

The district court acknowledged that the Petitioners had attacked the underlying injunctive orders in the contempt proceeding for lack of subject matter jurisdiction. 732 F. Supp at 400. (A-57). This attack was rejected by the district court (A-58) and the court of appeals, 961 F.2d at 396 (A-11 to A-14), which relied upon the earlier Second Circuit decision in *New York State Nat. Org. for Women v. Terry, supra*. Judge Sneed, visiting from the Ninth Circuit, noted in his terse concurring opinion that he joined in upholding subject matter jurisdiction only because of the strong views of the Second Circuit. 961 F.2d at 400 (A-23).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility where abortions were performed in an effort to close down the facility [and] . . . their purpose was to block the

doors so they cannot do abortions today". 732 F. Supp. at 393 (A-43), 405 (A-71).

In the earlier Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." 886 F.2d at 1363. The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." 886 F. 2d at 1363.

As the United States has said in its Amicus Curiae Brief in Support of Petitioners' in *Bray* at p. 2-3:

> Petitioner Operation Rescue is an unincorporated association *with the principal goals of preventing abortions and ending the legalization of abortions*. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. . . During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 19a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue - October 29, 1988*. During such a demonstration, no person - male or female - is allowed by the

demonstrators to enter the clinic. (emphasis added).

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000**
B.O.R.N.	1	$ 25,000
Randall A. Terry	3	$100,000***
Thomas Herlihy	1	$ 25,000
		$375,000

* 732 F. Supp. at 413-414 (A-89 to A-90); 961 F.2d at 394 (A-9). Fines were also assessed against non-petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violation) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398-400 (A-17 to A-21). Nathanson discontinued her appeal. Attorneys' fees were also assessed against all

contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395 (A-7 to A-10).

** Slattery was fined $50,000, $25,000 of which was suspended.

*** Terry's and Operation Rescue's fines were joint and several.

It is these phenomenally large contempt penalties, and their attendant attorney's fees, that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985

A. Federal Jurisdiction

Currently pending before this Court is the case of *Bray v. Alexandria Women's Health Clinic, cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985), which raises legal issues identical to those raised by Petitioners here.

In particular, Questions No. 4 in *Bray* is: "Are respondents' claims under *42 U.S.C. Section 1985(3)* so insubstantial as to deprive the federal courts of subject matter jurisdiction?" *Bray Pet. Cert.* at i. The "Questions Presented" section of this Petition contains the identical first four questions presented in the *Bray* case.

In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider this case with *Bray or hold* this Petition pending this Court's decision in *Bray*. If this Court answers this fourth question in the affirmative, as the *Bray* Petitioners urge, then this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bray* decision. As this Court has said in *United States v. United Mine Workers*, 330 U.S. 258, 195 (1947):

> The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. . . If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety. . . Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt . . . (citations omitted).

The principle of allowing a non-party to defend a civil contempt citation by attacking the subject matter jurisdiction of the lower court to issue the order was recently affirmed in *U.S. Catholic Conf. v. Abortion Rights*, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). In that case, the U.S. Catholic Conference of Bishops, a non-party, was held in civil contempt and fined $50,000 per day for disobeying a subpoena duces tecum to produce documents. The Catholic Bishops unsuccessfully challenged subject matter jurisdiction in the district court. The court of appeals limited the Bishops defense of the civil contempt

citation to the argument that "the district court lacked even colorable jurisdiction to hear the suit." 487 U.S. at 80. This Court reversed, holding that:

> When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction . . . Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas duces tecum are void, and the civil contempt citation must be reversed "in its entirety." Mine Workers, supra, at 295, 91 L.Ed. 884, 67 S.Ct. 677. (487 U.S. at 79-80).

This Court forcefully stated:

> The right of a nonparty to appeal an adjudication of contempt cannot be questioned. . . Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the

> government, must respect the limits of their authority. (487 U.S. at 76-77).

The court of appeals acknowledged that the district court could impose sanctions of civil contempt only if the 1985(3) claim was substantial. 961 F.2d at 395-396 (A-12 to A-14). If the non-party Petitioners in the case at bar and the *Bray* Petitioners are correct that the highly attenuated Ku Klux Klan Act claim of Respondents is insubstantial in a jurisdictional sense, then the purported civil contempt judgments with their fines and penalties "must be reversed in [their] entirety." *Catholic Conference*, 487 U.S. at 80. (quoting *United States v. United Mine Workers*). The three defendant Petitioners, Randall A. Terry, Operation Rescue and Thomas Herlihy, will benefit in the same manner if subject-matter jurisdiction is found to be lacking.

B. The Right to Interstate Travel

The most patently insubstantial aspect of the Respondents' purported federal claim under 42 U.S.C. Section 1985(3)[4] is the application of the right to interstate travel to Petitioners' anti-abortion demonstration activities. *See generally*

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[4] A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

Brief Amici Curiae of Daniel Berrigan, S.J. et al. in the *Bray* case (containing thorough analysis of Supreme Court decisions on the right to travel and concluding that the claims are jurisdictionally insubstantial as foreclosed by the prior decisions of this Court). As a threshold matter, there is no right to travel case factually analogous to rescue demonstrations of the type involved in this case. Such decisions involve infringement of the right to travel by state action, principally through discriminatory residency requirements.[5] The right to travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing rescue demonstrations, United States District Judge A. Wallace Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there in no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[6]

As the *Bray* Petitioners assert in their Main Brief at p. 25-26:

> The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington,

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[5] *See e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopes*, 476 U.S. 898 (1986).

[6] *National Abortion Federation v. Operation Rescue*, No. CV-89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

> D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation. . . This Court has never recognized a constitutional right to travel of such all-encompassing scope. . . The right to travel, however, is not an unlimited right to mere physical movement. . . . There is no general federal constitutional tort of obstruction of public or private passage.

See, Brief Amicus Curiae of United States in the *Bray* case at Section II. The right to interstate travel is not implicated where the Petitioners rescue demonstrations have only a *mere incidental effect upon travel*.

The application of the right to interstate travel to suppress traditional non-violent civil disobedience is nothing short of constitutional ambrosia - the creation of a federal cause of action where none exists.

C. Class Animus

In the court below, the finding that the class-based animus requirement was satisfied is premised upon a subset of gender: women seeking abortions. In rejecting this notion, United States District Judge A. Wallace Tashima has cogently

explained why this very class of "women seeking abortions" is not a class intended to be protected by the Ku Klux Klan Act[7]:

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis. (emphasis added).

As the United States argues in its *Bray* Amicus Curiae Brief at 15:

> Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion. . . Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin v. Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of

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7 *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989).

gender based discrimination because they are aimed at a *practice*, not a type of *person*.

According to the Respondents, early American feminists, many of whom adamantly opposed abortion as the "murder of the innocents" would possess the requisite gender based animus for purposes of 42 U.S.C. Section 1985(3). *See generally*, Brief of Feminists for Life in America, et al, as Amici Curiae in the *Bray* case.

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

The fact that the lower courts have conveniently denominated their penalty civil coercive contempt is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The unconditional and punitive character of the court's contempt proceeding orders made the contempt criminal. *Hicks v. Feiock, supra*, 485 U.S. at 632-633. So did their irrational severity, 100 times the criminal fine for the same offense in the absence of any damage to Respondents.[8] *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 1901-1904 (1989). Since none of the due process protections, required in criminal proceedings, were afforded Petitioners, the contempt judgments must be reversed. *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

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[8] The private Respondents during the contempt proceeding in the court below submitted arrest lists of some of the individual Petitioners, which lists show that they were charged with disorderly conduct, a violation, which carries a maximum fine of $250.00. See, New York Penal Laws, sections 240.25 and 73.

In the decision below, the court of appeals relied upon its prior decision in this case, *New York State National Organization for Women*, 886 F.2d at 1350-1351, which stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[9]

The criminal nature of the contempt judgments is further revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range*, 221 U.S. 418, 441 (1911). *Re Christian Engineering Co.*, 194 U.S. 458, 24 S.Ct.729, 47 L.Ed. 1072 (1903), involved the defendant's appeal of a $1,000.00 contempt fine in a patent suit for "disobedience of a preliminary injunction . . . . The fine was payable, one half to the United States and the other half to the complainant." 194 U.S. at 459. In explaining the criminal nature of the fine, this Court said:

> These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

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[9] *Penfield v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool v. Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock*, *supra*.

> In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. 194 U.S. at 460, 461.

In *Re Merchants' Stock & Grain*, 223 U.S. 639, 32 S.Ct. 339, 56 L.Ed. 584 (1912), contempt fines totalling $3,500, imposed for disobedience of a preliminary injunction, payable 75% to the plaintiff and 25% to the United States, were held to be criminal in nature, relying on *Christian Engineering, supra*.

Citing both *Christian Engineering* and *Merchants Stock & Grain*, Justice Brandeis, in *Union Tool Co. v. Wilson*, explained that:

> Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.

259 U.S. 107, 110 (1922). The instant contempt fines totalling $375,000, are not even a mixture of compensatory and punitive, but are payable solely to the United States. They are not compensatory; they are punitive and as such, criminal in nature.

The fact that the Second Circuit on its prior opinion, 886 F.2d 1339, modified the November 3, 1988, $50,000 Contempt Judgment, to be payable to the court (the United States) and not to the private Respondent N.O.W., reveals that the present contempt fines are clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are

clearly "intended as a deterrent to offenses against the public"[10] and "to punish the act of disobedience as a public wrong."[11]

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See, Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock, supra*; *Penfield v. Securities & Exchange Commission, supra*; *Doyle v. London Guarantee & Acc. Co.*, 204 U.S. 599, 51 L.Ed. 641, 644 ("compliance with the order relieves from payment."). When unconditional contempt fines were entered against the Petitioners, there was nothing the Petitioners could have done to purge themselves of the contempt. The judgments were therefore, *ipso facto*, criminal in nature.

The Second Circuit's reaffirmation (961 F.2d at 395 (A-12)) of its prior ruling (886 F.2d at 1350-1351) that the Petitioners' opportunity to comply with the order came *before* a violation occurred only manifests the invalidity of the Second Circuit's reasoning and suggests that due process is truly turned on its head when pro-life demonstrators are in the dock. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed with *conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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[10] *Nye, supra*, 313 U.S. at 42.

[11] *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[12]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[13] as well as other Second Circuit decisions.[14] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion rights, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh v. American Coll. of Obst. & Gyn*, 476 U.S. 747, 812 (1986) (White, J., dissenting).

CONCLUSION

For the foregoing reasons and those of the *Bray* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt

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12 *See also, Crozer-Chester Medical Center v. Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

13 *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir. 1980); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff v. Miller*, 702 F.2d 770 (9th Cir. 1983).

14 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Armabulo v. United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S. v. Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

judgments assessing $375,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bray*.

Dated: New Milford, CT.
August 11, 1992

Respectfully submitted,

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